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Nos. 81-2245, 81-2276 and 82-38

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEVADA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

TRUCKEE-CARSON IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
CROSS-PETITIONER

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE POST-ARGUMENT MEMORANDUM AND POST-ARGUMENT MEMORANDUM FOR THE UNITED STATES

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Pursuant to Rule 35.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves for leave to file the annexed post-argument memorandum.

These consolidated cases were orally argued on April 27, 1983, after extensive briefing addressing the history of the Pyramid Lake Reservation, the Newlands Project, and the *Orr Ditch* decree, as well as the numerous and complex factual and legal issues bearing on the allocation of the waters of the Truckee River. At the oral argument, a number of questions were raised from the Bench concerning the position of the United States on the issues addressed in Point A of our Brief. There we argue that, quite aside from the matter of a conflict of interest, the doctrine of res judicata does not bar the satisfaction of a previously reserved water right for fishery purposes on the Reservation out of the water made available to the United States for irrigation and other purposes. It appeared that our submission had created considerable uncertainty concerning the United States' view of the precise scope of the decree in *Orr Ditch* and the discretion left to the United States under that decree — as distinguished from limitations on the United States' use of Truckee River water that are derived from sources other than the decree, such as the contracts with individual Newlands Project water users.

The oral argument on behalf of the United States, only 15 minutes in length and necessarily addressing other points as well, appears to have left many questions unanswered in this area of particular concern to the Court. We regret any confusion we have caused. But we would regret even more if that confusion were permitted to linger and perhaps impede the Court's resolution of this case, which was brought by the United States because of past defaults by the government in its duty to the Tribe. In these circumstances, the Court may deem it helpful to consider the annexed memorandum, which is intended to clarify for the Court the position of the

United States regarding the relationship of the *Orr Ditch* decree and the contracts and the respective rights and liabilities of the parties under them.

Respectfully submitted.

REX E. LEE
Solicitor General

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POST-ARGUMENT MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted to clarify the position of the United States with respect to the argument set forth in Point A of our Brief as Respondent (at 23-33) in these consolidated cases, in light of questions from the Bench at

the oral argument on April 27, 1983. In Point A of that Brief we argue that under established principles of res judicata, the decree in *Orr Ditch* does not bar satisfaction of a previously reserved water right for fishery purposes on the Pyramid Lake Indian Reservation with an 1859 priority date out of water made available to the United States by that decree for irrigation and other uses having a priority date of 1902.[1]

We stress in this submission, as perhaps we did not sufficiently do before, that this case, in its current interlocutory stage, involves only the narrow issue of the scope of the judicially fashioned doctrine of res judicata as applied to the final decree that was entered in *Orr Ditch* — an issue that (assuming there was a full opportunity to be heard) turns on the precise terms of that decree. This case does not present the entire array of complex factual and legal issues that ultimately might affect the various rights of the United States, the Tribe, project landowners, and others to the use of waters in the Truckee and Carson Rivers. In particular, it does not call for resolution of the rights of landowners on the Newlands Project under their individual water contracts with the United States, because, as the Truckee-Carson Irrigation District (TCID) concedes (Reply Br. 4) and as is

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[1]This submission is independent of that set forth in Point B of the Brief (at 34-42), where we show the existence of conflict between the government's duty to secure water to fulfill the purposes of the Reservation and its interest in obtaining water for the Reclamation Project, recite the district court's express findings that this conflict was resolved by top-level Interior Department officials in favor of reclamation interests (see 81-2245 Pet App. 164a, 165a-166a, 179a, 185a (Fdg. 9), 189a (Fdg. 28)), and conclude that the reserved water right for fishery purposes therefore may be asserted against the very right to use water for reclamation purposes that was found to have conflicted with assertion of a fishery water right.

Unless otherwise stated, all references herein to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 81-2245.

evident from the face of the *Orr Ditch* decree itself, the rights of individual Newlands Project landowners were not adjudicated in *Orr Ditch*. See pages 4-7, *infra*. Nevertheless, because of the questions from the Bench at oral argument concerning the water right contracts and remedies available to landowners under them, we will touch on these issues here as well. See pages 7-12, *infra*.

The fact that the decree in *Orr Ditch* did not extend to a determination of the rights of individual landowners — just as it did not determine the existence of a prior reserved water right for fishery purposes on the Reservation (Pet. App. 189a (Fdg. 25), 245a) — underscores the soundness of the court of appeals' conclusion that res judicata does not bar partial satisfaction of a reserved water right in the United States on behalf of the Tribe for fishery purposes out of the water made available to the United States under the *Orr Ditch* decree.[2] The Tribe and Newlands Project landowners — the only parties on whose behalf water rights now may be adjudicated under the court of appeals' holding — of course were not parties to the *Orr Ditch* case.[3] If they

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[2]We use the words "partial satisfaction" because *Orr Ditch*, as implemented, did not accomplish a complete diversion of all of the waters of the Truckee River away from Pyramid Lake and its fishery. Between 1925 and 1967, an average of 215,000 acre feet of Truckee River water that was not diverted to the Newlands Project or to other upstream uses flowed into Pyramid Lake. See Tribe Br. in Opp. 2a. This residuum remains available to contribute toward the satisfaction of the reserved water right for the fishery if such a right is recognized by the courts below on remand. Under the court of appeals' decision, the prior reserved water right, if found to exist, would be satisfied out of the water made available to the United States under *Orr Ditch* for irrigation and other purposes only to the extent that the residuum of Truckee River water now flowing into Pyramid Lake is insufficient over a long-term hydrological cycle to meet the requirements of the fishery water right.

[3]As Judge Schroeder noted in her dissenting opinion below (Pet. App. 252a n. 1), this factor distinguishes such water adjudications as the *Kent* decree involving the Salt River in Arizona (*Hurley* v. *Abbott*, No.

had been parties, they presumably would have had a sufficiently full and fair opportunity to be heard through their own attorneys, even though the United States had a conflict of interest in seeking water for their competing uses. But not only were the Tribe and project landowners not parties; the respective rights they seek to have recognized and protected in this case were not even adjudicated in *Orr Ditch*. In these circumstances, it would be strange indeed to hold that the *Orr Ditch* decree nevertheless conclusively determined all competing rights of the Tribe and Newlands Project landowners inter se. The court of appeals therefore correctly determined that in this case, in which the Tribe and project landowners *are* parties, the relative rights of these parties now may be conclusively determined.

1. The objective of the *Orr Ditch* proceedings — initiated by the United States — was to determine and quantify all rights to Truckee River water that must be satisfied before the United States could serve its needs and to adjudicate the right to divert the remainder to the government (Pet. App. 145a, 164a). Accordingly, all non-federal claims were decreed with precision. See Pet. App. 68a-141a. Not so, the major rights of the United States. The final decree in *Orr Ditch* awarded only an *aggregate* right to the United States, with a 1902 priority date, to divert water at Derby Dam for a number of purposes (Pet. App. 59a):

> Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff is entitled and allowed to divert, with a priority of July 2, 1902, through the

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4564 Decree (Dist. Ct. 3d Jud. Dist. Ariz. Mar. 1, 1910)), because the landowners to whom rights were decreed in that case were made parties (slip op. 7). The *Kent* decree and decision are reproduced in *Indian Water Rights of the Five Central Tribes of Arizona: Hearings Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 149-226 (1975).

> Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project, for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, and under such control, disposal and regulation as the plaintiff may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project.

To be sure, this language imposes some limitations on the *maximum* amount of water that may be diverted by the United States. But the decree does not go further and compel the United States to divert a particular *minimum* quantity of water, parcel out to particular uses the aggregate right awarded to the United States, or establish any rights of individual landowners on the Newlands Project to receive Truckee River water for their tracts of land. This is made clear both by the language just quoted and by the implementation of the decree since it was entered:

a. Thus, the decree declares that the United States is "allowed" to divert "1,500 cubic feet * * * per second" of Truckee River water through the Truckee Canal. This amounts, on an annual basis, to more than 1,000,000 acre feet of water. Yet, no one suggests that any such diversion is possible, or required so far as possible. On the contrary, insofar as the *Orr Ditch* decree is concerned, the United States is free not to exercise its rights to their full extent and instead to allow some or all Truckee River water reaching Derby Dam to flow into Pyramid Lake. See note 2, *supra*. That was, indeed, the premise for the view expressed by the government attorneys responsible for the case while it was

pending that water could be made available to the Reservation for fishery or irrigation purposes through the United States' operation of Derby Dam to allow the release of the necessary amount of water to the Reservation. See Gov't Br. 11 & n.12; Pet. App. 207a, 244a n.21.

b. Similarly, the decree speaks of irrigating "232,800 acres of land on the Newlands Project." But that does not remotely mean that when water is diverted into the Truckee Canal, the United States is obligated by the terms of the decree to furnish water to irrigate all 232,800 acres. To the contrary, it always has been understood by all concerned that there is not nearly enough water in the Truckee and Carson Rivers combined to irrigate that much land, even if all of it were capable of being beneficially irrigated, and only approximately 65,000 acres actually have been irrigated and only approximately 73,000 acres have project water rights. Gov't Br. 12 n.13. Obviously, the decree itself did not determine which particular parcels, or which landowners, within the Project area would be assigned water.[4] That was a matter left to the government to resolve, by contract or regulation.

c. So, also, by providing that the water allowed for irrigation, when applied to the land, "shall not exceed" 3.5 acre feet per acre for bottom lands and 4.5 acre feet per acre for bench lands, the decree simply established the maximum amounts that may be delivered for irrigation. In fact, the project water right contracts entered into with the Secretary by individual landowners on the Newlands Project long have expressly limited the amount of water to be

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[4]Compare the portions of the *Orr Ditch* decree that confirm reserved water rights for irrigation purposes on the Reservation, which are awarded specifically for the use and benefit of the Indians and may not be transferred to others (Pet. App. 57a-58a).

furnished to 42,000 acres of project land to only 3.0 acre feet per acre annually. See Gov't Br. 4-6 & n.4.[5]

In short, the decree in *Orr Ditch* established only the outer limits of the United States' aggregate right to divert water at Derby Dam, and explicitly left the use of whatever water actually was diverted "under such control, disposal and regulation as the plaintiff [the United States] may make or desire" (Pet. App. 59a).[6]

2. We have stressed that it is the decree in *Orr Ditch* that is relevant for res judicata purposes, and that the decree in *Orr Ditch* went no further than declaring this right to divert water at Derby Dam with a 1902 priority after rights with an earlier priority date were satisfied.[7] We did not intend to

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[5]On January 24, 1983, in an appeal involving the general stream adjudication on the Carson River, the Ninth Circuit held that the 3.0 acre-feet-per-acre limitations in the Newlands Project water contracts may be disregarded because of the court's own de novo determination many years later that water duties of 3.5 and 4.5 acre feet per acre would be more appropriate. See *United States* v. *Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983), petition for cert. pending, No. 82-1723. This holding is, in our view, plainly incorrect. See Gov't Br. 4-6. But even if the court of appeals reached the correct result in 1983, project landowners did not have a legitimate expectation of receiving more than the amount specified in the contracts for 42,000 acres of project land during the many decades between the opening of the Project and 1983, especially in view of the temporary restraining order in effect since 1950 in *Alpine* limiting the water duty to 2.92 acre feet per acre. See Gov't Br. 4-6 & n.4.

[6]Article 7 of the 1926 Contract with TCID, to which individual landowners have consented by operation of Article 12 of the Contract, confirms the Secretary's regulatory authority over the Newlands Project and the limitations in the individual water right contracts, and further requires TCID to "use all proper methods and precautions to secure the economical and beneficial use of irrigation water * * *." See Gov't Br. 6.

[7]See Pet. App. 146a ("this decree does not and shall not in any way determine the title to or rights in any property whatsoever, other than the rights to diversion and use of water as herein determined and established").

suggest, however, that because the decree in *Orr Ditch* did not establish any rights in individual project landowners, the United States therefore is not subject to *any* limitations with respect to the water in question and may devote it to any use it wishes without regard to the interests of Newlands Project landowners. The fact is that the United States entered into contracts for the delivery of water to individual landowners out of the water diverted from the Truckee and Carson Rivers and those contracts create a right in individual landowners, with the 1902 priority date of the appropriation by the United States, to receive water to irrigate their lands.

Thus, if the United States wanted to use the water now being furnished under contract to project landowners for some other purpose having a priority date later than 1902 —such as for a new wildlife refuge or the MX missile, the examples cited at oral argument — the United States clearly would have to pay the landowners for their water rights, even assuming that it were free to devote water to these other uses. Here, however, we are asserting a *prior* right, enjoying a priority date of 1859—far earlier than the 1902 priority date for irrigation uses on the Newlands Project.[8] The satisfaction of the right of individual Newlands Project landowners with a 1902 priority date to receive water for irrigation must always be contingent upon the availability of water after rights to the use of water with an earlier priority date—here, rights for Reservation purposes—have been satisfied.

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[8]Because the court of appeals held that assertion of the fishery right against all Truckee River water users named as defendants in *Orr Ditch* and their successors in interest is barred by the doctrine of res judicata, as against these other water users, only a 1902 priority date can be recognized for the fishery under the judgment below. But of course, the United States, in distributing the water allocated to it by the decree, remains obligated to respect the priority of the earlier Reservation entitlement.

This is not to say, however, that Newlands Project landowners would be wholly without a remedy if the Secretary were unable in certain years to furnish them with the amount of water to which they are entitled under their contracts after satisfying the Reservation's fishery needs. It would be premature to decide that question here, because it has not yet been determined whether a reserved water right for fishery purposes exists, and the nature and extent of any such right have not been adjudicated. Cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 688-689 (1981). As we explain in our Brief (at 44-46), a number of factors — including the reduced demand for water for the fishery in dry years, and the potential for significant improvements in the inefficient delivery system on the Newlands Project — would serve to mitigate the impact of a reserved fishery right on the Project, and some period of transition and adjustment would be permitted in any event. Nevertheless, in light of the Court's apparent interest in this issue at oral argument, we briefly identify what we believe to be some of the relevant considerations bearing on the availability of a remedy against the United States, in the event it ultimately is determined on remand that satisfaction of the fishery water right would require some curtailing of deliveries to the Newlands Project.

As an initial matter, consistent with the usual rule, the project farmers would not be entitled to specific performance of their contracts with the United States to receive project water (see *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Ickes* v. *Fox*, 300 U.S. 82, 96 (1937)), especially where, as here, the Secretary's inability to meet their demands would result from the satisfaction of a water right with an earlier priority.[9] An award

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[9]The Court did indicate in *Ickes* v. *Fox*, *supra*, that an injunction could issue to prevent the Secretary from failing to furnish water to water users on a reclamation project where the Secretary is not

of injunctive relief barring the satisfaction of the prior reserved water right for the fishery and requiring water to be furnished instead to the Newlands Project would be inappropriate in this case in any event, because of the direct and substantial conflict of interest that infected the *Orr Ditch* litigation. The United States has acknowledged that its conduct in this regard significantly contributed to the present situation. Where a trustee has breached its fiduciary duty in this fashion, it is appropriate that the property in question be restored to the beneficiary. See Gov't Br. 41-42.

In addition, although the United States must bear prime responsibility for the default, it by no means follows that TCID and the Newlands Project landowners it represents can be regarded as innocent bystanders. The reservation of Pyramid Lake for the benefit of the Tribe was expressed in the documents establishing the Reservation; it was not implied. Moreover, the district court in Nevada ruled more than a century ago that the Lake was set aside for the Tribe because of its fishery (*United States* v. *Sturgeon*, 27 F. Cas. 1357, 1358 (D. Nev.) (No. 16,413), aff'd, 27 F. Cas. 1358 (1879)), and the decline of the fishery following the diversions to the Newlands Project was widely known (Pet. App.

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authorized by statute to withhold the water necessary to satisfy the project water rights. 300 U.S. at 94-97; see *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 702 n.26. In the present case, however, it could not seriously be contended that the Secretary is prohibited by law from satisfying a prior reserved water right for the Pyramid Lake Reservation before furnishing water to the reclamation project. Indeed, Section 8 of the Reclamation Act, 43 U.S.C. 383, expressly provides that nothing in that Act shall affect the pre-existing rights of the Federal Government or other users of water of the streams from which water is appropriated for reclamation projects. Moreover, the court of appeals in this case specifically held that the Secretary was not entitled to override the water rights reserved in connection with the Pyramid Lake Indian Reservation in acquiring and furnishing water for the Newlands Project (Pet. App. 215a-219a), and petitioners have not challenged that holding here.

186a (Fdg. 10), 187a (Fdg. 14)). These circumstances alone should be sufficient to support the conclusion that TCID and its constituent landowners knew, or reasonably should have known, that the government's seeking of substantial water rights for the Newlands Project would conflict with its duty to protect the Reservation. Cf. *Wood* v. *Georgia*, 450 U.S. 261, 272 & n.18 (1981); *Cuyler* v. *Sullivan*, 446 U.S. 335, 347 (1980).

But beyond this, the record establishes and TCID concedes (TCID Resp. Br. 22-25) that while *Orr Ditch* was pending, TCID vigorously opposed assertion by the government of substantially increased reserved water rights for the Tribe for irrigation purposes (Exh. U-265, Tribe Resp. Br. App. 7-13), and TCID also vigorously opposed suggestions that additional water be furnished to Pyramid Lake for the fishery (Exh. U-242, Tribe Resp. Br. App. 2-6) and even refused to consent to releases of water at Derby Dam for two weeks in 1926 for fishery purposes (J.A. 439) — all on the ground that the water supply for the Newlands Project would be adversely affected. These actions made it manifest to TCID — the representative of project water users — that the government's duty as trustee to protect the Tribe's interests conflicted with the government's interest in securing the greatest amount of water for the Project.[10] Moreover, project landowners cannot claim the benefit of the decree in *Orr Ditch* for purposes of claiming water out of that awarded to the United States and at the same time disassociate themselves from the government's conflict of interest in *Orr Ditch*—which the district court found to have been "squarely presented," "apparent," and "foreseeable" (Pet.

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[10]The district court found only that the defendants in *Orr Ditch* were not chargeable with knowledge of any conflict of interest on the part of the government in *Orr Ditch* (Pet. App. 191a (Fdg. 31)); it made no such finding as regards TCID or its constituent Project landowners, whose interests were those that directly conflicted with that of the Tribe.

App. 165a, 189a) — or the government's conduct in resolving that conflict against the Tribe. See *Smith* v. *Ayre*, 101 U.S. 320, 326 (1880).

There remains, then, the question whether the possible inability of the Secretary to deliver the full amount of water provided for under the individual water contracts with Newlands Project landowners in certain years would give rise to a cause of action for damages under the Tucker Act for breach of those individual contracts, as the court of appeals suggested. See Pet. App. 245a-246a. In our view, whether the contracts should be deemed breached in these circumstances, giving rise to a damages remedy, would depend in large part on a determination whether the recognition of a reserved water right with a priority date earlier than 1902 that rendered water unavailable for irrigation purposes on the Newlands Project is an event that was not within the contemplation of the parties when the contracts were entered into for which the United States should be held to have assumed the risk—at least where, as here, the United States itself has sought to establish the existence of the prior right that was not expressly mentioned in the *Orr Ditch* decree. But, because the issue is not directly raised in this case and the circumstances that might necessitate its resolution are still quite speculative, we deem it inappropriate at this time to prejudge the outcome of any such claim.

For the foregoing reasons and the additional reasons stated in our principal brief and at oral argument, the judgment of the court of appeals should be affirmed.

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